

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN
[SQUARE BRACKETS]

**IN THE DISTRICT COURT
AT WELLINGTON**

**I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA**

**CRI-2024-085-000136
[2024] NZDC 21771**

MARITIME NEW ZEALAND
Prosecutor

v

KIWIRAIL LIMITED
Defendant

Hearing: 9 September 2024
Appearances: B Finn for the Prosecutor
M Campbell for the Defendant
Judgment: 9 September 2024

NOTES OF JUDGE P A H HOBBS ON SENTENCING

[1] On 28 January 2023, the Interisland ferry Kaitaki operated by KiwiRail was travelling from Picton to Wellington with approximately 850 passengers onboard. At about 4.55 pm, the main engine shut down. At the time, the Kaitaki was one nautical mile off Sinclair Head. Due to southerly winds at the time, the Kaitaki began drifting towards the shore. The master of the Kaitaki made a Mayday call and prepared the crew and passengers for an evacuation. When it was possible to do so, two anchors were dropped which prevented the Kaitaki from drifting ashore. At the rate of drift being experienced at the time, the Kaitaki had about 12 minutes before it reached shallow dangerous waters when the anchors were dropped.

[2] A high temperature outlet compensator on the vessel's diesel generator had failed and caused the ship's cooling water to drain out. The main engines had shut down to prevent them from suffering catastrophic damage due to overheating. A compensator, which is also known as a "bellow", "rubber expansion joint" or "coupling", is a flexible rubber component designed to connect rigid piping systems which carry fluids, slurries or gases under pressure or vacuum at varying temperatures. The compensators are used to dampen the effects of vibration on the rigid piping. On the Kaitaki, compensators were used, amongst other things, to connect the piping system which carried the high temperature cooling water around all the main engines and diesel generators of the vessel.

[3] Once the high temperature compensator was replaced by the engineer and crew and the cooling water system refilled, power was restored to the engines. Following restoration of power, the Kaitaki continued its journey to Wellington without further incident. The vessel had been without power from 4.45 pm until 5.55 pm.

[4] As a result of this incident, KiwiRail has pleaded guilty to a charge laid under the Health and Safety at Work Act 2015 of failing to implement systems and processes to ensure that adequate and effective maintenance of plant, in this case the compensators, was carried out with that failure exposing passengers and workers onboard the Kaitaki to the risk of death or serious injury.

[5] In sentencing KiwiRail, I must apply the Sentencing Act 2002. I must also have regard to the purposes of the Health and Safety at Work Act, the potential for injury or death and whether that risk could have reasonably been expected to have occurred. I must also take into account KiwiRail's safety record, the degree of departure from prevailing industry standards and the financial capacity of KiwiRail to pay a fine.

[6] The leading judgment I must have regard to is the High Court decision of *Stumpmaster v WorkSafe*.¹ The High Court set out a four-step approach to sentencing; however, in this case, the prosecution does not seek an order for reparation as it accepts

¹ *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020.

that none of the passengers suffered physical injuries or ongoing levels of emotional harm that would warrant an award of reparation.

[7] Nonetheless, it is important to acknowledge and recognise the distress, fear and impact this incident had on crew and passengers. While all onboard have no doubt been impacted differently, it would have been a frightening experience. That is evident from the victim impact statements that have been read today. The impact on those onboard must be taken into account when assessing the overall seriousness of KiwiRail's offending.

[8] The failure of the compensator was most likely caused by the extended duration of operating at a high temperature and the age of the compensator. Compensators have a limited service life due to material degrading over time.

[9] With respect to the relevant background to this failure, in April of 2007 KiwiRail engaged Mariko Marine to identify potential failure scenarios that could result in loss of control on the Kaitaki. KiwiRail was made aware that machinery shutdown had occurred on at least two previous occasions on the Kaitaki due to the failures of the compensators; it is important to note, however, that this had occurred while the vessel was operating in Europe and not by KiwiRail. However, the failure of compensators was identified as a risk to the vessel and it was recommended that the compensators be replaced every two years irrespective of their condition.

[10] In August 2007, the failure of a compensator caused the Kaitaki to lose power while berthed in Wellington. The chief engineer at the time recommended that all compensators be inspected immediately and replaced on a four-year cycle from that date which was in line with industry standards.

[11] The compensators were due to be replaced during the August and September 2022 dry dock but as a result of time constraints they were not replaced. On 19 October 2022, the chief engineer on the Kaitaki noted that one of the compensators was in a very poor condition and was thought to be indicative of the condition of all compensators onboard. There is no record of any compensators being replaced in 2022.

[12] The compensator that failed on 28 January 2023 had been in service for five years and eight months at the time of its failure. It was manufactured in 2005, making it almost 18 years old when it failed.

[13] It is clear that as long ago as 2007, KiwiRail was on notice about the risk of compensators failing. It was an obvious risk. KiwiRail failed to replace the compensators when intended in August and September of 2022 and failed to take action in October 2022 when the chief engineer raised concerns about the condition of at least one of the compensators.

[14] Industry standards indicate that the compensators should be replaced every four years. This was clearly not done. There is nothing to suggest that the cost of replacing the compensators was prohibitive, nor was it necessary for the compensators to be replaced while the vessel was on dry dock. The compensators could have been replaced as part of routine maintenance outside of the more comprehensive dry dock maintenance.

[15] KiwiRail emphasises that it did have systems of planned and regular maintenance in place including in respect of compensators that was consistent with industry practice. I have read the affidavit of Mr Duncan Roy, the Executive General Manager for Interisland ferries, who started his role after this incident. He sets out in some detail the safety management system that the Interisland ferries operate under.

[16] KiwiRail says it is not a case of having no systems of planned and regular maintenance in place in accordance with industry standards but rather a failure on this occasion to implement those systems and processes. KiwiRail also identified the linking of the compensators in the asset management system to the engines instead of the cooling system as a problem. Had they been correctly linked to the cooling system, they would have been characterised as a critical system and therefore subject to greater monitoring and scrutiny.

[17] It is clear that this is not a case of having no plan or system in place for the proper maintenance of the vessel. Nonetheless, KiwiRail accept that the systems

failed. All the systems in the world will be of little use if they are not effective systems and not followed.

[18] Mr Campbell emphasises the professional and efficient response of the crew during the emergency which averted further harm or a more tragic outcome. [Name deleted] a passenger onboard, has today spoken of what he said was the professional response of the crew. Others have also made mention of the excellent response from the crew onboard on this occasion. I appreciate that may not have been everybody's experience but it is my impression that the crew did everything they could during this emergency.

[19] Fortunately, no physical harm was caused which Mr Campbell for KiwiRail says is significant. Having said that, it was clearly emotionally distressing for many. The nature and seriousness of the risk was high.

[20] With all of this in mind and having regard to the cases the prosecution has referred to in its written submissions, the prosecution submits that in terms of the culpability bands that are set out in the *Stumpmaster* case, KiwiRail's culpability sits at the lower end of the higher band or the upper end of the medium band which gives a starting point fine of \$600,000.

[21] Mr Campbell for KiwiRail emphasises that there were systems in place and that this was not a case involving a wholesale disregard for maintenance and while the risk of harm or death was present, that risk was not realised. Mr Campbell also submits that the two cases in particular referred to by the prosecution are more serious than the one before me today. Mr Campbell submits that a starting point of \$450,000 is appropriate.

[22] In my view, the risk of a compensator failing was well-known to KiwiRail. It was an obvious risk that exposed crew and passengers to the risk of serious injury or death; acknowledging, however, that fortunately no physical injury occurred. The failure to replace the compensator or compensators was a significant departure from industry standards but again I acknowledge this is not a case of there being no systems in place but rather a case of failing to ensure those systems were properly

implemented. In my view, having regard to the particular circumstances of this case, the submissions of counsel and the cases referred to me, a fine of \$550,000 is appropriate.

[23] KiwiRail has what the prosecutor describes as a poor safety record with respect to ferry services. What is relevant to note is that in 2021, Maritime New Zealand accepted an application for an enforceable undertaking from KiwiRail following an incident on 19 April 2019 where a worker slipped and fell due to insufficient non-skid surfacing. In 2022, Maritime New Zealand prosecuted KiwiRail together with another organisation for an incident onboard the Interisland ferry in 2020 when a driver of a vehicle was pinned between two trucks. KiwiRail pleaded guilty to charges in relation to that incident. In 2023, Maritime New Zealand prosecuted KiwiRail for an incident which saw a worker injured when he was crushed between two rail wagons. Again, KiwiRail pleaded guilty to charges in relation to that incident. The prosecution also points out that there have been previous convictions for breaches of the Health and Safety in Employment Act 1992, the predecessor to the current Act.

[24] With this history in mind, the prosecutor submits that an uplift of 15 per cent to the fine is appropriate. Mr Campbell submits that no more than 10 per cent is appropriate. In my view, 10 per cent is the appropriate uplift which increases the fine to \$605,000.

[25] The prosecutor submits that no more than 20 per cent should be afforded to KiwiRail by way of credit for its guilty plea. Mr Campbell, for KiwiRail, submits that it should be the maximum of 25 per cent. In addition, Mr Campbell submits that KiwiRail should be afforded a further 15 per cent credit for its co-operation with the investigation and prosecution, KiwiRail's remorse and the remedial steps it has taken since this incident.

[26] Mr Campbell does accept that the cost order of \$20,000 sought by the prosecution is appropriate.

[27] I see no reason why, in this case, KiwiRail should not be afforded the maximum credit of 25 per cent for its guilty plea, bearing in mind the timing of that plea. I do

not accept that KiwiRail is entitled to any further credit for its co-operation with the investigation, although I acknowledge the co-operation, in the circumstances of this case I agree with the prosecution that this is the lack of an aggravating feature rather than a mitigating feature.

[28] I accept, based on the submissions made and the affidavit filed by Mr Roy, that KiwiRail has taken its failures seriously and has expressed a commitment to preventing such an incident from occurring again in the future. I have to say that such a commitment would be expected in this case and the lack of any such commitment would be alarming. I do, however, accept that KiwiRail has taken a number of remedial steps. In Mr Campbell's submission and the affidavit of Mr Roy, they are set out. Those remedial steps can be recognised by way of a five per cent credit.

[29] The prosecution now accepts that a further five per cent is available for KiwiRail's remorse and Mr Roy today has in court made a public apology for the failings of KiwiRail and the impact those failings have had on those onboard the vessel on this occasion.

[30] That gives a total of 35 per cent by way of credit. The result is a fine of \$412,500 and a cost award of \$20,000 which is a total of \$432,500.

[31] I am required to stand back and consider whether or not that is an appropriate suite of sanctions. I am satisfied that it is and, bearing in mind the resources available to KiwiRail, I see no need to adjust that for reasons of KiwiRail's financial capacity to pay such a fine and costs.

Judge PAH Hobbs
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 14/09/2024